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DECISION



**THE COMPTROLLER GENERAL
OF THE UNITED STATES**
WASHINGTON, D.C. 20548

FILE: B-205129

DATE: June 8, 1982

MATTER OF: Claude E. Atkins Enterprises, Inc.

DIGEST:

1. Protest that the proposal selected for award did not conform to mandatory requirements of the RFP is denied where the contracting agency shows that the requirements in issue either were not mandatory or in fact were complied with.
2. RFP requirements that are susceptible of only one reasonable interpretation are not ambiguous.
3. No useful purpose would be served by GAO's consideration of protest against successful offeror's conformance with certain RFP requirements where the record shows that the protester would not be in line for award even if the protest were sustained.
4. GAO has no authority under the Freedom of Information Act to determine what information must be disclosed by other Government agencies.

Claude E. Atkins Enterprises, Inc. protests the Department of the Navy's award of a contract to Morrison-Knudsen Company (M-K) under request for proposals (RFP) N62474-80-R-0426 to construct 270 family housing units. Atkins contends that the M-K proposal fails to meet (1) the life safety requirements of the Uniform Building Code, particularly with respect to the number of exits per dwelling, (2) requirements of the Department of Housing and Urban Development (HUD) Minimum Property Standards, and (3) a number of other RFP specifications.

We deny the protest.

This procurement was effected pursuant to Navy "turnkey" procedures. Under the turnkey method, a developer builds according to plans and specifications prepared by its own architect and to a standard of good design, quality and workmanship. Necessarily, the guidance in the solicitation is limited to an indication of the features required, such as style of house and number of bedrooms, and an indication of where the housing is to be located on the site. See 51 Comp. Gen. 129, 131 (1971).

The RFP's "Design and Construction" requirements were in the second section of the solicitation. Section 2A, "Design/Construction/Criteria," listed three subsections: 2A.1 "OBJECTIVES," 2A.2 "SCOPE OF WORK," and 2A.3 "GOVERNMENT FURNISHED EQUIPMENT (GFE)." Subsection 2A.1 stated:

"APPLICABLE STANDARDS: To obtain family housing complete and adequate for assignment as Government quarters to military personnel and their families, which will be constructed in accordance with sound and efficient construction practices and the following standards:

1. HUD Minimum Property Standards
* * *
2. HUD Manual of Acceptable Practices
* * * as applicable.
3. HUD Minimum Design Standards for
Community Water Supply Systems
* * *.
4. HUD Minimum Design Standards for
Community Sewage Systems * * *.
5. National Electric Code * * * as
applicable.
6. Uniform Building Code * * * as
applicable.
7. ICBO Plumbing Code * * *."

The HUD Minimum Property Standards (the first standard listed) define the minimum level of acceptability of design and construction standards for low rent public housing and for housing approved for mortgage insurance purposes. The Uniform Building Code (listed sixth), published by the International Conference of Building Officials, is intended to provide minimum health and property safeguards by regulating and controlling building design, construction, use and maintenance.

Five offerors responded to the RFP. Award was to be based on the lowest "dollar to quality point ratio," determined by dividing the offered price by the technical points assigned. M-K offered to build the units for \$14,017,700, and was assigned 765 points on technical evaluation. The firm had the lowest dollar per point ratio, \$18,926. Atkins' offer was \$17,098,098, and the firm received 526 points, resulting in the highest ratio, \$32,506.

1. The two-exit requirement

Sections 2B through 2J of the RFP set out the specific design and construction requirements for the housing project. For example, section 2B listed site design and construction requirements (the sewage system, landscaping, etc.); section 2C listed "Dwelling Unit Design/Construction" requirements (kitchen specifications, bedroom dimensions, etc.). The number of exits per dwelling is a concern of section 2C.

Atkins argues that the Uniform Building Code exit requirement is incorporated into section 2C because it is listed in subsection 2A.1 as one of the seven standards that apply to the project. According to the protester, the Uniform Building Code requires two exits in each dwelling of the type involved here. Atkins protests that the M-K proposal, which only provides for one exit, thus does not conform to the RFP requirement; Atkins asserts that it is substantially less expensive to provide one exit per dwelling instead of two.

The Navy responds that RFP subsection 2A.1 simply lists various design and construction standards that apply to various elements of the housing project as specified in the RFP discussion of each of those elements. The Navy points out that section 2C specifically provides in subparagraph 1a "General" that "Design and construction shall meet or exceed the HUD * * * [Minimum Property Standards] except as modified herein." The Navy argues that this reference clearly indicates that the Minimum Property Standards govern dwelling unit design and construction requirements such as the number of exits.

The Minimum Property Standards allow one exit, and the Navy contends that M-K's offer of one exit therefore conformed to the RFP.

We agree with the Navy's reading of the RFP. It is apparent that the listing of "APPLICABLE STANDARDS" in subsection 2A.1 only reflects the various codes and standards that apply to the various portions of the project where referenced in the specifications, or where obviously applicable (for example, "Plumbing Code," the seventh standard, obviously applies to plumbing requirements). In our view, it is unreasonable to assume that all of the standards listed apply to each element of the project merely because they are listed together before the specific design and construction requirements are set out. Nor do we believe that a particular standard that could apply necessarily applies where another that also could apply is specifically referenced in the section in issue. For example, notwithstanding that the Uniform Building Code evidently could have been applied to section 2C to require two exits per dwelling, the fact is that the RFP only specified that performance under the section "shall meet or exceed" the HUD Minimum Property Standards. We therefore find it unreasonable to assume that a proposal had to conform to the Uniform Building Code's two-exit requirement.

Atkins also complains that M-K's offer does not meet the Uniform Building Code requirements with respect to the arrangement of exits and the configuration of and materials to be used for the exterior stairways. Since these construction factors, however, also are elements of RFP section 2C, to which Uniform Building Code requirements do not apply, M-K's alleged failure to conform to them is not relevant to the selection.

Atkins argues in connection with the above that if indeed it misinterpreted the RFP regarding the applicability of Uniform Building Code requirements to section 2C, its interpretation was reasonable. Atkins asserts that since the solicitation thus was susceptible to two reasonable readings--the Navy's and Atkins'--it was ambiguous and the requirement should be clarified and resolicited. Atkins suggests that if given the opportunity to submit a proposal based on, for example, a single exit per dwelling (instead of two exits per dwelling, on which its actual proposal was based), the firm can submit a less expensive and, presumably, technically superior offer.

Since we believe that the only reasonable reading of the RFP is that the Minimum Property Standards, not the Uniform Building Code, clearly govern the design and construction elements in RFP section 2C, we find no merit to Atkins' contention that the RFP was ambiguous. Atkins' reliance, in preparing its offer, on an unreasonable interpretation of the RFP in that respect affords no basis to recompute the project.

2. Minimum Property Standards and other RFP requirements

Atkins protests that M-K's proposal does not meet (1) Minimum Property Standards requirements regarding width of exterior exit balconies, exterior exit stairway covering, fire resistance, and courtyard dimensions, and (2) a number of other RFP design requirements. The Navy has responded to each alleged deficiency in M-K's proposal, asserting that the proposal either complies with both the HUD Minimum Property Standards and the solicitation, or that M-K in fact was penalized in the technical evaluation where it did not fully comply.

We need not consider these matters because they are academic insofar as the protester's interest in this procurement is concerned. In contrast to Atkins' argument that it could have submitted a much more competitive offer if it had competed under what it now understands was the Navy's intention with respect to Uniform Building Code applicability to RFP section 2C, a matter which would affect the entire competition, the thrust of the protest on this issue merely is that M-K's offer should have been rejected or penalized in the technical evaluation.

Atkins, however, received the highest dollar to quality point ratio (\$32,506) of the five firms that responded to the RFP; the other three ratios were \$18,580, \$18,926, and \$23,475 (as stated above, M-K's was \$18,324). Under the RFP's award criterion, therefore, Atkins would not be in line for award even if the Navy had rejected or downgraded M-K's proposal. Thus, even if Atkins was correct on any of these matters, Atkins simply would not receive the contract. There is no useful purpose to be served, therefore, by our consideration of the matters. See Ven-Tel, Inc., B-204233, March 8, 1982, 82-1 CPD 207.

3. Evaluation material

Atkins complains that the Navy has refused to furnish to the firm technical evaluation and selection records requested under the Freedom of Information Act, 5 U.S.C. § 552 (1976). The Navy advised the firm that it believes that the records are exempt from disclosure in that their release would make impossible the "full and frank exchange of opinions by members of the slating and selection boards * * *." The Navy has, however, submitted the documents to our Office for review. See Corbetta Construction Company of Illinois, Inc., 55 Comp. Gen. 972, 990 (1976), 76-1 CPD 240, where we recommended precisely this procedure in a protest involving another Navy turnkey housing project where the Navy also declined to release the proposal evaluation records to the protester.

We first point out that our Office has no authority under the Freedom of Information Act to determine what information must be disclosed by Government agencies. While information in an agency report which the agency believes is exempt from disclosure under the statute will be considered by our Office in reaching a decision on the merits of the protest, we will not disclose it outside the Government. The protester's recourse in such situations is to pursue its disclosure remedy under the procedures provided by the act. INTASA, B-191877, November 15, 1978, 78-2 CPD 347.

Here, Atkins clearly has had the opportunity to scrutinize the winning proposal, and the Navy's report to our Office contains detailed discussions of each issue raised by Atkins and sufficient documentation to support the selection decision. As indicated in the above discussions, we have reviewed the entire record and have concluded that it does not support Atkins' positions. See Bell & Howell Corporation, B-196165, July 20, 1981, 81-2 CPD 49.

The protest is denied.

Milton J. Aronson
for Comptroller General
of the United States